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CHARLES ELMORE HAWLEY

No. 317

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In the Supreme Court of the United States

OCTOBER TERM, 1942

THE UNITED STATES OF AMERICA, PETITIONER

v.

JOSEPH H. DOTTERWEICH

**MEMORANDUM IN OPPOSITION TO PETITION FOR A
WRIT OF CERTIORARI TO THE UNITED STATES
CIRCUIT COURT OF APPEALS FOR THE SECOND
CIRCUIT**

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In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 717

THE UNITED STATES OF AMERICA, PETITIONER

v.

JOSEPH H. DOTTERWEICH

MEMORANDUM IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit entered December 3, 1942, (R. 282).

The question which the government presents for review by this Court (p. 2 of brief) is:

“Whether the manager of a corporation, as well as the corporation itself, may be prosecuted under the Federal Food, Drug & Cosmetic Act of 1938 for the introduction of misbranded and adulterated articles into interstate commerce.”

We respectfully contend that this question sought to be reviewed is not a question at all and certainly has nothing to do with the case at bar. It is in fact a reflection upon the Circuit Court of Appeals for the Second Circuit to insist that such a question exists for

review. It is, and always has been, an accepted rule of law, and may be termed an academic proposition, and existed long before the statutes of the United States. It is part of the Common Law. Of course, a manager of a corporation, as well as the corporation itself, may be prosecuted under a criminal statute if both the corporation and the manager did anything that was violative of the law.

This is on the theory that the manager of any other person who aids, abets or assists in the commission of a crime is a principal. But that is not this case.

The Circuit Court of Appeals in this case (R. 282), upon the proposition we there urged, said the following:

"The foregoing discussion has proceeded upon the assumption that if the statute is applicable to the appellant, it must also apply to a shipping clerk or any other menial employee who was instrumental in causing the forbidden shipment, for we can find no basis in the statutory language for drawing a distinction between agents of high or low rank. We are not, however, to be understood to rule that under no circumstances could an individual conducting a drug business in corporate form be subjected to the penalties of Sec. 331 (a). If an individual operated a corporation as his 'alter ego' or agent he might be the principal; *but the evidence hardly went so far as to establish that such was the relationship between the appellant and his corporation and in any event his guilt was not made to turn on any such issue.*" (Italics ours.)

If there was any question to be submitted to this court for review, and we respectfully submit there is none, it should be whether the manager of this corporation, and upon the evidence in this case, may be

prosecuted under the Federal Food, Drug & Cosmetic Act of 1938.

This situation can be summed up in one paragraph, to wit, that the reversal by the Circuit Court of Appeals was because of the evidence in the case and the theory upon which the learned District Court Judge conceived the law to be.

The following occurred in the presence of the jury when the question sought to be determined here was directly brought to the attention of the District Court Judge (R. 291):

"Mr. Fleischman: We will assume that our office boy sent out some stuff from a responsible concern; he takes it off the shelf and he sells it; he has every reason and right to suppose that it came from a very reliable concern, perhaps the most responsible in the country, and he sent it out, and your contention as I get it now—

"The Court: *I think I would be glad to rule that the office boy would be equally guilty. (Italics ours.)*

"Mr. Fleischman: That is a proposition on which you are now ruling?

"The Court: Yes.

"Mr. Fleischman: I will respectfully take an exception."

There were a number of questions submitted to the Circuit Court of Appeals in this case upon which they ruled against us and reversed only because they felt that the manager of a corporation who did not know, and could not know, that a product which had been purchased by the corporation from another large pharmaceutical corporation did not in fact contain the full strength required by the federal law.

It, therefore, might be of some interest to briefly set forth the facts in this case.

The Buffalo Pharmaceutical Co., of which the respondent Joseph H. Dotterweich, is the manager, is a concern employing approximately thirty people. They are not engaged in the compounding of any drugs. They are in fact "jobbers". All that they do is to package the material they purchase in their own containers and their own labels and send it out. In the case of the digitalis which the government speaks of, there were a million pills or tablets purchased and sold in bottles of one thousand to physicians throughout the country. The government inspector picked up but one of these bottles that was not up to standard. There was no proof in this case that any of the other pills or tablets in the many other hundreds of bottles were similarly under standard, nor was there any proof that the pills or tablets in the single bottle in question, and which bottle was half used when picked up from the Doctor, were under standard when shipped. The testimony clearly indicated that many things may happen which would reduce the strength or potency of this drug. Of course, the defendants in this case had no way of proving that in the single bottle, which was the basis of this prosecution, that heat, or light, or lack of refrigeration, or moisture, did not in some way come in contact with this particular bottle so as to cause this loss of strength.

But the legal question presented was whether upon the facts in this particular case the general manager, not even knowing of this shipment because it went through in the regular course of business, could be held

responsible together with the corporation, for the fact that unknown to it, or to him, a single bottle of this product deteriorated or was not up to standard strength. Throughout the case the contention of the government was that the good faith and the honest dealing of the Buffalo Pharmaceutical Company, Inc., or of its manager, or of any of its employees, was not questioned.

It, therefore, presented itself as a question to the appellate court, whether upon this record the general manager of this corporation, who we repeat had no knowledge of this transaction, could be convicted of a misdemeanor.

We respectfully present that the dire results prophesied by the Solicitor General as a result of this case upon other prosecutions, cannot possibly become a fact. There has been a new trial ordered by the Circuit Court of Appeals and upon that trial the question of fact as to whether this manager had any connection with this shipment, can be gone into very fully.

The Solicitor General points out that under the Act of June 30, 1906, 21 USCA Sec. 4, which was the old Pure Food & Drug Act, it was provided that "the act, omission or failure of any officer, agent or other person acting for or employed by any corporation, company, society or association, within the scope of his employment or office, shall in every case be also deemed to be the act, omission or failure of such corporation, company, society or association as well as that of the person." He fails, however, to point out that when the law relating to pure food and drugs was changed, to wit, in 1938, under the statute involved in this case,

that this very provision was omitted. We agree with the argument in the Circuit Court of Appeals by the District Attorney that the reason it was omitted was because there was no necessity for it since the common law covered it, and the act of any person associated with the corporation which was wrong could be punished. But it had to be some act on the part of that individual and he, therefore, had to be a principal.

Where bad faith or evil intent are not necessary proof in a criminal case, in other words, if the crime is one *Mala prohibitum*, there can be no conviction of a person on the theory that he aided or abetted.

It is admitted in this case that the manager acted in good faith himself and did nothing intentionally wrong. So, therefore, how could he be a principal by aiding or abetting, by directly committing any act constituting an offense defined in any law of the United States, or in other words, how could he aid or abet, counsel, command, induce or procure the commission of a crime *Mala prohibitum* of which he, in fact, knew nothing about. Only the person or corporation, which is by law made responsible for the crime, can be prosecuted for the same.

To hold otherwise would mean that the whole theory of the government in this prosecution was wrong. If this respondent is to be prosecuted as a principal, then it seems clear that the requirement of this statute as to serving him with notice to appear for hearing, and the ability of that person to receive a guarantee, would have to be established. But the manager of this corporation, or any other employee, could not receive the guarantee provided in Sub sec. (C) of 21 USCA 333.

and, therefore, was deprived of a protection which is accorded his principal and by which the principal could escape prosecution.

While we do not agree with all of the conclusions reached by the Circuit Court of Appeals, the views expressed by that court on the question which it is claimed there exists in this case for review, are very clear. They are contained in the record on appeal on pages 280, 281 and 282.

We respectfully present that the application for a writ of certiorari in this case should be denied, and when this case is retried, as it must be, a clearer record will be presented for review.

Respectfully submitted,

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